



June 23, 1999

Ms. Susan Combs
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR99-1750

Dear Ms. Combs:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 125405. Your office has assigned this request tracking number TDA-OR-99-0047.

The Texas Department of Agriculture (the "department") received a request for the "investigation file" pertaining to TDA Incident Number 2424-02-98-0052. In response to the request, you submit to this office for review the information at issue. You state that most of the requested information will be released to the requestor. You claim, however, that the submitted information, Exhibit B, is excepted from required public disclosure based on sections 552.101,¹ 552.107 and 552.111 of the Government Code. We have considered the exceptions and arguments you have raised and reviewed the submitted information.

You contend that the requested document may be withheld as attorney work product under section 552.111. A governmental body may withhold attorney work product from public disclosure under section 552.111 if it demonstrates that the material 1) was created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental

¹Although early open records decisions permitted governmental bodies to withhold from disclosure information within the attorney-client privilege pursuant to section 552.101, the privilege is specifically covered under section 552.107(1). Section 552.107 is the appropriate section to cite when seeking to withhold from disclosure communications between the governmental body and its legal counsel. See Open Records Decision No. 574 (1990).

processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 4

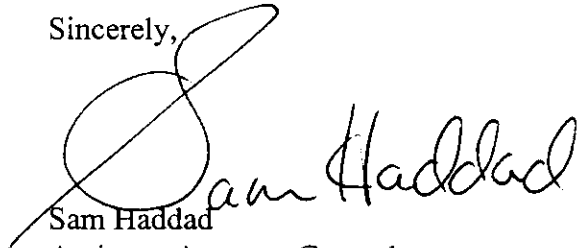
You indicate that the information at issue was gathered or prepared in anticipation of litigation. You explain that the department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapter 76 of the Agriculture Code. Agric. Code §§ 12.020, 76.1555(a). You inform us that the requested information was gathered for and concerned an administrative action, initiated by the department, which alleged specific violations of chapter 76. Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act, chapter 2001 of the Government Code. *Id.* at § 76.1555(h); *cf* Open Records Decision No. 588 at 7 (1991) (contested cases conducted under the Administrative Procedure Act are considered litigation under section 552.103). We find that you have demonstrated in this case that the document at issue was created in anticipation of litigation.

The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You state that the materials represent the summary of the case presented to the client agency, including litigation recommendations, for the purposes of rendering legal advice and determining the client agency's litigation goals. Having reviewed the information and your arguments, we conclude that the information reveals attorney mental impressions, conclusions and strategy. Although the document at issue contains factual information, based on your representation that the attorney made the decision to include the facts in the summary, we conclude that the presentation of those facts would reveal the attorney's impressions and legal strategy. We agree that such facts are also attorney work product excepted from disclosure under section 552.111. The department, therefore, may withhold Exhibit B in its entirety pursuant to section 552.111.²

²Because we resolve your request under section 552.111, we need not address the other exceptions you raise.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 125405

Encl: Submitted documents

cc: Mr. Garlin Scroggins
Route 4, Box 552
Bowie, Texas 76230
(w/o enclosures)